



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

Agency Name:	Department of Agriculture and Consumer Services (Commissioner of)
VAC Chapter Number:	2 VAC 5-20
Regulation Title:	Standards for Classification of Real Estate as Devoted to Agricultural Use and to Horticultural use under the Virginia Land Use Assessment Law
Action Title:	Amend
Date:	August 26, 2002

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The existing regulation establishes standards that are used to determine whether or not real estate is devoted to agricultural or horticultural purposes. Included in the regulation is a requirement (subject to certain exceptions) that real estate have a history of five consecutive years' previous use for agricultural or horticultural purposes before it may qualify for the lower tax rates associated with agricultural or horticultural use.

The present regulatory action is for the purpose of implementing legislation affecting the regulation. That legislation authorizes localities, in the case of crops that require more than two

years from initial planting to commercially feasible harvesting, to waive the regulation's required history of previous use. That legislation also requires the Commissioner of Agriculture and Consumer Services to adopt implementing regulations.

The regulatory action is also for the purpose of clarifying and correcting the regulation.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

The statutory authority for this proposed regulation is Section 58.1-3230 of the Code of Virginia, as well as Chapter 705 of the Acts of Assembly for 2001.

Specifically, the proposed amendments to the regulation are largely for the purpose of implementing Chapter 705 of the Acts of Assembly for 2001. Under that act, localities are authorized to waive, with respect to real estate devoted to the production of crops that require more than two years from initial planting until commercially feasible harvesting, any requirement contained in the regulation that requires the real estate to have been used for a particular purpose for a minimum length of time before qualifying as real estate devoted to agricultural use or horticultural use. Chapter 705, in clause 2 (clause 2 not being set out in the Code of Virginia) goes on to require the Commissioner to adopt "all reasonable and necessary regulations to carry out the provisions of this act."

Specifically, the legislation necessitating the proposed substantive amendment to the regulation is written conditionally. It states (in language of the act amending Section 58.1-3231 of the Code):

"If the uniform standards prescribed by the Commissioner of Agriculture and Consumer Services pursuant to Section 58.1-3230 require real estate to have been used for a particular purpose for a minimum length of time before qualifying as real estate devoted to agricultural use or horticultural use, then such ordinance may waive such prior use requirement for real estate devoted to the production of agricultural and horticultural crops that require more than two years from initial planting until commercially feasible harvesting." [emphasis added]

The substantive proposed amendment to the regulation is by way of acknowledgement of and in response to the "if" contained in the statute, acknowledgement that there is indeed a provision in the regulation requiring that the real estate have been used for a particular purpose for a

minimum length of time before qualifying as real estate devoted to agricultural use or horticulture use.

The statutory authority contained in Chapter 705 is mandatory. The remaining amendments contained in the proposed regulation are based upon permissive statutory authority, although sound regulatory policy (such as clarity of writing) argue for their adoption.

Certain other exemptions already contained in the regulation have been brought together and re-written, for clarity's and accuracy's sake. (As a part of the re-writing of the exemptions section, the reference to "farm operator" has been omitted from the exemptions language, since the applicant may not be a farm operator. Any tax advantage afforded by the regulation has always enured to the real estate owner, who may also be a farm operator. It is the owner's land that is being converted, whether he is the farm operator or not.)

The web site address for the cited codified legal authority is: <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC5801000>. The substance of the second enactment clause is recited and largely quoted earlier in this "Basis" section of the Agency Background Document.

The Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal laws.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

The purpose of the proposed action is to make amendments to the regulation to ensure its effectiveness and continued need, including amending the regulation to satisfy the statutory amendment made by Chapter 705 of the 2001 Acts of Assembly, discussed under the "Basis" section of this report, above.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.

The substance of the amendment is to make provision in regulation for a requirement of law, namely that the Commissioner of Agriculture and Consumer Services adopt a regulation governing localities' waiving the provision of the regulation requiring that real estate have been used for a certain purpose for a specified period of time in order to qualify for agricultural or horticultural use.

Issues

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

The substance of this proposed regulation is required by statute, a matter over which the agency has no control. Hence the discussion below is essentially a discussion of the merits of the statute:

There are no known disadvantages associated with the proposal.

The advantages to the public and the Commonwealth include those enunciated in the "Declaration of Policy" quoted as a part of the specific and measurable goals, under "Periodic Review," below. Also, more specifically, the proposal may have the beneficial effect of encouraging people to develop farms for the production of crops that, because they are borne on trees or vines which must first develop, take a long time between planting and commercially feasible harvesting. Such crops would include grapes and at least certain tree-grown fruits.

Certain agricultural and horticultural real estate may reap the benefits of the short-term tax benefits associated with the legislation requiring this amended regulation. This may mean an earlier reduction in taxes for real estate devoted to the purposes specified in the legislation in localities that afford a different tax status to agricultural and horticultural estate, but localities do not have to participate in such a program affording a different tax status to such real estate. On the other hand, a reduced tax may have the effect of encouraging the production of crops (such as grapes) that are associated with value-added products (such as wine), which may lead to additional tax revenues.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's

best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.

The statute causes to be waived, when a locality so desires it in the case of real estate devoted to the production of a crop that requires more than two years from initial planting until commercially feasible harvesting, the agency's existing requirement of regulation that real estate be used for agricultural or horticultural purposes for a certain specified minimum period of time before it can be taxed at lower rates associated with such purposes. The fiscal impact caused by the statute is as follows:

A. The projected cost to the state to implement and enforce the proposed regulation:

1. Fund source/fund detail:

General fund (01/00)

2. Budget activity with a cross-reference to program and subprogram:

Commissioner's Office and other related support offices

Program: 549, Administrative and support services

Subprogram: 01, General management and direction

3. A delineation of one-time versus on-going expenditures:

On-going

B. The projected cost of the regulation on localities:

It is difficult to know what the projected cost of the regulation on localities would be. This is because: (1) no locality is required to waive the five-year-history requirement contained in the regulation; (2) even if a locality were to waive the five-year-history requirement, there may be no one who qualifies for the waiver; (3) even if a locality were to waive the five-year-history requirement and someone qualifies for the waiver, it is not known how much acreage would be devoted to real estate that would qualify for the waiver, the amount of acreage being at the discretion of the land owner.

However, no locality can be affected unless it chooses or has chosen to participate (a voluntary decision) in a program of taxation based on the value of real estate

when used for agricultural or horticultural purposes. The scheme of exceptions that is in the existing regulation is merely carried over into the new, proposed regulation, though in clearer, re-written language. The only new kind of exemption is that specifically created by the statute, which the agency has merely incorporated into the exemptions language.

- C. A description of the individuals, businesses or other entities that are likely to be affected by the regulation:
 - 1. Localities with a program of taxation of real estate based on the real estate's use for agricultural or horticultural purposes.
 - 2. Those engaged in agriculture or horticulture.

- D. The agency's best estimate of the number of such entities that will be affected:

Eighty-six localities (that is, 68 counties and 18 cities) have ordinances authorizing the taxation of real estate based on its agricultural or horticultural use. Of these, it is unknown how many will avail themselves of the authority contained in the legislation and hence in the regulation. Also, perhaps certain localities that do not now have ordinances may enact ordinances in the future, and may include in their ordinances the waiver authorized by the statute.

It is not known how many engaged in agriculture or horticulture might be affected.

- E. The projected cost of the regulation for affected individuals, businesses or other entities.

There is no cost to individuals or businesses expected. The only cost that may occur is to localities that have decided to tax real estate based on its agricultural or horticultural use value, and this cost may not occur at all or may be offset by enhanced tax revenues associated with the production of certain crops.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

Section 10: The agency proposes to strike a statement of statutory authority contained in the first sentence of the regulation, for the struck section does not appear to contain explicit statutory

authority for the regulation. Also, the agency proposes in Section 10 to clarify the regulation by striking a passage that purports to summarize existing statutory law. The agency believes that direct recourse to the statutes is the appropriate means of finding the law. Since no recitation of statutory authority remains in this section (the statutory authority being cited instead at the head of the proposed regulation), the agency proposes re-titling this section "Preamble," a title more in keeping with the remaining content of the section.

Section 20: The exceptions to the five-year history requirement contained in the existing regulation are to be found in both subsections A and C. However, the exceptions to the five-year history requirement should be put in one place, specifically in subsection A, which is the five-year-history requirement. To do this, the agency proposes to add two new subdivision titles under subsection A. The two new subdivision titles are: "Qualifying uses, five-year history of previous use," and "Exceptions to the five-year-history-of -previous-use requirement." Dividing subsection A into two pieces provides a designated place (namely in the second subdivision) for the exceptions to the five-year-history requirement. Furthermore, the agency proposes to rewrite the exceptions in clear language.

There is one other exception contained in subsection C, but it does not appear to be an exception to the five-year-history rule. Rather, to the best of the agency's understanding, the language relating to "government action" is really a provision authorizing the use of agricultural or horticultural real estate in such a way that, if the real estate is for some time devoted to a governmental conservation program (even if no crop is produced) the real estate is to be considered productive for the time that it was so devoted. The agency has rewritten this passage to say that devotion of real estate to a government program that encourages conservation is not a bar to the real estate's being considered as being devoted to a qualifying use. Furthermore, the agency has included this re-written passage in both the "previous use" and "current use" subsections (the passage being written in the past tense in one instance and in the present tense in the other), because it seems logically associated with both, despite the fact that its predecessor passage appears in a single iteration--specifically in subsection C.

Having thus re-assigned the various exceptions contained in subsection C, which was devoted solely to exceptions, the agency proposes to strike subsection C.

Section 40: Section 40 governs the interpretation of the regulation. The regulation declares that in cases of uncertainty on the part of the Commissioner of the Revenue or local assessing officer, the law authorizes him to request an opinion from the Commissioner of Agriculture and Consumer Services as to whether a particular property meets the criteria contained in the regulation for agricultural or horticultural taxation. The regulation lists certain information that the Commissioner of the Revenue or local assessing officer must provide to the Commissioner of Agriculture and Consumer Services when requesting an interpretation (such as the total number of acres involved). The agency proposes to add to that list an item requiring that in any case involving a question involving the newly authorized exception to the five-year-history-of-previous-use requirement, the Commissioner of the Revenue or local assessing officer state whether the locality has waived the previous-use requirement.

In Section 40, the agency proposes striking a sentence that appears to authorize an action (specifically an appeal of the decision of the Commissioner of Agriculture and Consumer Services in a tax matter) that is provided for by statute. The agency believes that direct recourse to the statute is the best means of finding the law.

In Section 40 is a footnote relating to a conservation farm management plan prepared by a professional, which, according to the regulation, the Commissioner of the Revenue may find useful in making a determination that real estate is devoted to agriculture or horticulture. In explaining this provision, the footnote states that such a plan is required by the 1985 farm bill, an apparently inaccurate statement. The agency proposes striking the footnote.

Also in Section 40 is a footnote relating to the definition of "farm" used by the National Agricultural Statistics Service (NASS), a branch of the United States Department of Agriculture. In attempting to verify (and to the extent necessary update) the definition, the agency made several contacts with NASS' staff. According to one source, the definition is not codified in U. S. law. None of those contacted was able to identify any law or regulation in which the definition is codified. Consultation with staff of the American Farm Bureau Federation also led to their conclusion that the definition is not codified in law or regulation. In fact, consultation of two NASS Internet sites on the same day produced the following, differing definitions of "farm":

"A farm is defined as any place which produced and sold or normally would have produced or sold \$1,000 worth of agricultural products during the year."

"A farm is defined as 'any establishment from which \$1,000 or more of agricultural products were sold or would normally be sold during the year'."

In the absence of a verifiable, consistent, codified federal definition, the agency proposes striking the footnote.

Lastly in Section 40, the agency proposes to update the reference to "ASCS" (which stands for "Agricultural Stabilization and Conservation Service," an organization that has been re-named the "Farm Service Agency.")

Alternatives

Please describe the specific alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

The agency considered not developing the proposed regulation. However, since the substantive proposed regulation is mandated, this was not a viable option. The language of the proposed regulation is the least-burdensome, least-intrusive alternative, as it is crafted solely for the limited purpose of implementing the newly-enacted law mandating the regulation and solely for the purpose of making other simple clarifying or correcting amendments.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

The agency received no public comment during the NOIRA comment period.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

As noted, the agency proposes to make clarifying amendments. Otherwise, the agency, through examination of the regulation and relevant public comments (there were none) has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

The agency intends to initiate a review and re-evaluation of the regulation to determine if the regulation should be continued, amended, or terminated. The review will take place within time frames specified in the pertinent executive order.

The specific and measurable goals of the regulation are:

1. The protection of the public's health, safety, and welfare with the least possible cost and intrusiveness to the citizens and businesses of the Commonwealth; and
2. The preservation and conservation of real estate for agricultural and horticultural use.

In a "Declaration of Policy" contained in the tax laws as they relate to the agricultural and horticultural use of real estate, the General Assembly calls attention to the public-health and public-welfare benefits of a program of taxation of land based on its agricultural or horticultural use. Specifically, the General Assembly states that:

"An expanding population and reduction in the quantity and quality of real estate devoted to agricultural, horticultural, forest and open space uses make the preservation of such

real estate a matter vital to the public interest. It is, therefore, in the public interest (a) to encourage the preservation and proper use of such real estate in order to assure a readily available source of agricultural, horticultural and forest products and of open spaces within reach of concentrations of population, to conserve natural resources in forms which will prevent erosion, to protect adequate and safe water supplies, to preserve scenic natural beauty and open spaces and to promote land-use planning and the orderly development of real estate for the accommodation of an expanding population, and (b) to promote a balanced economy and ameliorate pressures which force the conversion of such real estate to more intensive uses and which are attributable in part to the assessment of such real estate at values incompatible with its use and preservation for agricultural, horticultural, forest or open space purposes.

It is the intent of this article to provide for the classification, and permit the assessment and taxation, of such real estate in a manner that will promote the preservation of it ultimately for the public benefit." [See Section 58.1-3229, Acts 1984, c. 675.]

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The substantive portion of the amendment is required by statute, and so the discussion below is in effect an analysis of the impact of the statute:

By potentially decreasing the taxes paid by farm families who would benefit from the legislation requiring this regulation, this regulation may increase disposable family.

The proposed regulation is thus expected, by increasing resources to those families, to: (1) strengthen the authority and rights of parents in the education, nurturing, and supervision of their children; (2) encourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; and (3) strengthen the marital commitment. The proposed regulation is also thus expected to have a positive effect on family formation, stability, and autonomy.

To the extent that the proposed regulation has an income-enhancing effect for families, it should have a positive effect, for purposes of Section 2.2-606 of the Code of Virginia, on family formation, stability, and autonomy.

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